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In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, APPELLANT

v.

WALLACE & TIERNAN Co., INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court dismissing the complaint without prejudice at the close of trial (R. 232-242) has not yet been reported.

JURISDICTION

The judgment of dismissal was entered August 6, 1948 (R. 242).¹ The appeal was taken on October 4, 1948 (R. 242-244). The jurisdiction of this

¹ This was the date on which the clerk of the court entered judgment in accordance with the district court's opinion. A formal judgment was signed and entered on September 3, 1948 (R. 376).

Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d Sess.

QUESTIONS PRESENTED

1. Whether a judgment dismissing the complaint without prejudice after the government stated that all substantial evidence which it then had available had been excluded by the trial court's intermediate ruling is appealable as a final judgment which was not invited by the government.

2. Whether an order for suppression of evidence in a criminal information proceeding which has not been terminated is *res judicata* on the right of the government to use such evidence in a civil suit.

3. Whether the fact that documents have been produced pursuant to a reasonable subpoena before a grand jury subsequently found to have been defectively constituted in the circumstances of this case precludes the Government from using information obtained from such documents in order to have the documents produced before a valid judicial tribunal under valid judicial process.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The Fourth Amendment provides in part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2, 4) commonly known as the Sherman Act, are as follows:

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

SEC. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

Rule 41(b) of the Federal Rules of Civil Procedure provides in pertinent part:

* * * After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 41(e) of the Federal Rules of Criminal Procedure provides in pertinent part:

* * * A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable

cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. * * *

STATEMENT

This is a civil proceeding filed in the United States District Court for the District of Rhode Island on November 18, 1946, charging six corporations and seven of their officers with conspiring to restrain and monopolize interstate commerce in chlorinating equipment; in violation of Sections 1 and 2 of the Sherman Act (R. 8-27). On the day on which this suit was filed, a grand jury empaneled by the same district court returned an indictment (No. 6055) making substantially the same charges against the same defendants and certain others (R. 251-272).

Prior to November 18, 1946, the corporations subsequently indicted had produced some 200,000 pages of documents before the grand jury (R. 49-50) in obedience to subpoenas *duces tecum* which the court had sustained against defendants' motions to quash on the ground that the demands of the subpoenas were so broad and indefinite as to constitute an unreasonable search and seizure contrary to the Fourth Amendment (R. 82). Some

8,000 of the subpoenaed documents, constituting those deemed relevant to the issue of law violation, were photostated, numbered, and indexed by the Government (R. 35-36, 44).

Following the decision in *Ballard v. United States*, 329 U. S. 187, the appellees moved to dismiss the indictment upon the ground that the grand jury had been illegally constituted in that women had been intentionally and systematically excluded from the panel. The district court upheld these motions and entered judgment on April 7, 1947, dismissing the indictment (R. 56-70). The issue turned on Section 37 of Chapter 700 of the Laws of Rhode Island, 1939, which provides that "Whenever the jury commissioner shall determine that the accommodations and facilities of the superior courthouse in any county are such as to allow of the service of women as jurors", he should certify such fact to the Secretary of State and include women in the panel of those summoned for jury duty. After reviewing the facilities available in the federal building in Rhode Island, the court expressed the opinion that while they "are not the best accommodation in this day and age that should be available for women called upon to perform the public duty of jury service, nevertheless, they are accommodations and facilities that could be used." (R. 68-69.) Although expressing doubts as to the validity of its decision (R. 69), the court dismissed the indictment because of the failure to in-

clude women on the panel of grand jurors (R. 70). The Government took no appeal from the judgment of dismissal. The court also issued orders directing that the documents, which had been produced before the grand jury and impounded by order of the court, be released from the impounding order and returned to the appellees (R. 72-75).

In May, 1947, the Government filed a criminal information (No. 6070) making the same charges against the same defendants as those made in the indictment (No. 6055) which had been dismissed (R. 272-294). The appellees then moved that all photostats of documents which had been produced before the grand jury be surrendered to them (R. 76-80), and the court, by an opinion filed February 6, 1948 granted appellees' motions (R. 81-85).² The court stated in its opinion that "the subpoenas did not violate the Fourth Amendment and the Government was entitled to have the documents produced for presentation to a legal grand jury" (R. 84). It held, however, that the production of documents pursuant to subpoena constituted a search and seizure; that when it turned out that the grand jury for whose use the documents were produced had been illegally constituted, the search and seizure became unreasonable; and that photostats of the documents so produced were the fruits of an illegal search and seizure which could not be retained by

²The opinion is reported as *In re Wallace & Tiernan Co., Inc.*, 76 F. Supp. 215.

the Government (R. 84-85). The court's order, which was made part of the record in No. 6055 (the indictment proceedings), directed surrender of the photostats on or before April 20, 1948 (R. 85).

With respect to the information, appellees moved for an order (1) dismissing the criminal information; or (2) in the alternative expunging all portions thereof which were based on knowledge obtained from documents produced before the grand jury; and (3) for "an order precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence" obtained from the documents (R. 87-91). The court denied the motion to dismiss or expunge on the ground that it could not then say that the government might not be able to procure evidence in support of its allegations from sources other than documents produced before the grand jury. As to the motion to preclude, the court stated that its opinion of February 6, 1948 was controlling (R. 91-95).

The Government moved for a stay of entry of an order on that opinion, and for a stay of execution of the orders issued in No. 6055, directing return of the photostats (R. 97, 115). Counsel for the Government pointed out that the court had theretofore declined to rule on the extent to which the Government could use the documents produced before the grand jury in the civil case, and called attention to the fact that the Government had moved in the

civil case for the production of the documents (R. 97-98). Counsel stated that, if the court adhered to its position and ruled against the Government in the civil case, it was the Government's intention to review that ruling by the only avenue of appeal open to it, i.e., an appeal in the civil case (R. 101-104). The Government also asked the court not to take any step in the information proceeding which might prevent correction of an error, if the appellate court should hold that there had not been an unlawful search and seizure (R. 115, 117, 119, 120, 125). In the course of the argument, the court stated that the order on its decision with respect to the motion to preclude would prevent the use of the documents "only in this action" i.e., only with respect to the criminal information (R. 117). The court further stated, "I don't see how this is going to prejudice you in some other case, and this Court is only concerned with 6070 at this time, as I understand it" (R. 126). On April 20, 1948, the court entered an order which provided that its opinion of February 6th was controlling as to paragraph 3 of the appellees' motion, i.e., the request to preclude the use for any purpose of the information obtained from the documents produced before the grand jury (R. 95-96).

In the civil case, the Government filed a motion under Rule 34 of the Federal Rules of Civil Procedure for the production by the defendant corporations of the documents which had been produced

before the grand jury, and which had been photostated by the Government as identified in an attached schedule (R. 36-46). Subsequently, the Government procured the issuance of subpoenas *daces tecum* directed to the corporations previously indicted, including corporations not made parties to the civil suit for the production of documents theretofore submitted to the grand jury and photostated by the Government as identified by attached schedules (R. 136-181). Appellees moved to quash the subpoenas (R. 182-192). Early in the argument on these motions, the court indicated that it intended to adhere to its previous rulings, to deny the Government's motion for production of documents under Rule 34, and to quash the subpoenas (R. 193-194). The Government then stated that it wished the case to be set for trial so that the Government could make a statement of its inability to proceed in view of the trial court's rulings (R. 196-197). In response to statements by counsel for the defense that they would need more time if there were to be a trial in the usual sense of the term, government counsel stated that "in view of the rulings of the Court announced today, the Government doesn't intend to offer evidence if a date is granted as we have requested" (R. 198). An opinion on the motion for discovery was filed on May 26, 1948 (R. 294-304), and formal orders giving effect to the court's rulings on the motion for production of testimony, and on appellees' motions to

quash the subpoenas were entered on June 1, 1948 (R. 201-202).

At the trial, the Government stated that the documents for which subpoenas had been issued constituted substantially all of the Government's case, and that such evidence as it had apart from these documents was so incomplete and piecemeal as to be virtually meaningless (R. 206-207). The Government called upon the defendants to produce the subpoenaed documents, and moved the court to vacate its orders quashing the subpoenas (R. 207, 210). When the court denied these motions (R. 209, 210), the Government put on the stand an attorney who had participated in the grand jury proceedings, and sought to elicit testimony from him as to the contents of the documents produced before the grand jury (R. 210). After the court had excluded such testimony (R. 213-214), the Government filed, by way of an offer of proof (R. 214, 218), an affidavit of counsel averring that the subpoenaed documents were relevant and material to the issues in the case, and "constitute substantially all of the Government's evidence in this case" (R. 231). The affidavit further stated (R. 231-232):

the Government has no present knowledge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged by the complaint, and, although conceivably such evidence might be obtained, that could only be done after an investigation co-

extensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents.

The Government then rested, and asked the court to enter judgment for the plaintiff (R. 220). Defense counsel stated that, in the existing posture of the case, the defendants were not called upon to present any evidence and would not do so (R. 222-225, 227-228).

The court, at the conclusion of the trial, took the case under advisement (R. 228-229). It filed an opinion on August 6, 1948, which quotes extensively from the transcript of the trial, states that the reality "practically amounts to non-prosecution" by the Government, and directs entry of judgment dismissing the action without prejudice (R. 232-242).

ASSIGNMENT OF ERRORS

1. The court erred in denying the Government's motion under Rule 34 of the Federal Rules of Civil Procedure for the production by defendant corporations of certain specified documents.

2. The court erred in denying the Government's motion for the production by defendant corporations of photostatic copies of documents previously surrendered by the Government in obedience to an order of the court.

3. The court erred in quashing the subpoenas *duces tecum* issued in May 1948 to defendant cor-

porations and certain other corporations and in denying the Government's motion to vacate the orders of the court quashing these subpoenas.

4. The court erred in excluding secondary evidence as to the contents of any document which had been produced before the grand jury which returned an indictment (No. 6055) against the defendants.

5. The court erred in basing each of the rulings covered by the errors assigned in Nos. 1-4, inclusive, upon the ground that the production of documents, pursuant to subpoenas *duces tecum*, before a grand jury which was improperly constituted violates the Fourth Amendment.

6. The court erred in basing each of the rulings covered by the errors assigned in Nos. 1-4, inclusive, upon the ground that the prior production of documents, pursuant to subpoenas *duces tecum*, before an improperly constituted grand jury operated to bar the Government from obtaining these documents by appropriate legal process or procedure in another proceeding and from using the documents, evidence as to their contents, or information derived therefrom, as evidence in another proceeding.

7. The court erred in stating that when the Government rested its case at the trial after having been prevented by the court's rulings from presenting all evidence which it had which would establish the allegations of its complaint, the course pursued

by the Government "practically amounts to non-prosecution".

8. The court erred in entering judgment dismissing the Government's complaint.

SUMMARY OF ARGUMENT

I

The judgment dismissing the complaint without prejudice is clearly a final judgment since it terminates the cause in which it was entered. *Wecker v. National Enameling Co.*, 204 U.S. 176, 182. The only question with respect to the appealability of such judgment is whether it was voluntarily sought by the Government so as to come within the principle that one who invites error may not complain of such error on appeal.

The history of the various proceedings in the criminal and civil causes establishes that the judgment of dismissal was not the result of the Government's voluntary action. The Government consistently sought to obtain the evidence which it needed to prove its case and submitted to a judgment of dismissal only because the rulings of the district judge barred it from producing substantially all the evidence which it had available. Government counsel was able to state that there would be no trial in the usual sense only because he correctly anticipated that at the trial the Court would adhere to its previous rulings which barred the Government from proving its case.

The fact that the dismissal was without prejudice does not show that the dismissal was voluntarily sought by the Government. The Court apparently dismissed the action without prejudice because Government counsel stated that "conceivably" additional evidence might be obtained after another extensive investigation. That the Court, believing its rulings on evidence to be correct, decided not to grant complete immunity to appellees for their illegal acts in the event that the Government should discover new evidence, certainly does not establish that the Government consented to the dismissal of an action which it could have proved immediately if the Court had not improperly excluded the evidence then available.

II

There is no issue of *res judicata* in this case. The orders entered in the indictment proceedings merely directed the return of the original documents and surrender of the photostats; they did not bar the further use of such evidence. An order for return of evidence is not necessarily an order of preclusion. *Zap v. United States*, 328 U.S. 624, 629; *In re Sand Laboratories*, 115 F. 2d 717, 718 (C.A. 3), certiorari denied, 312 U.S. 688.

Although the order entered in the information proceeding may be read so as to preclude the Government from using the documents and information obtained therefrom for any purpose, it is at least debatable whether Rule 41(e) of the Federal

Rules of Criminal Procedure was ever intended to authorize an order that would have binding effect in a later civil case of this character, and it is abundantly plain from the record here that the District Judge never intended his order in the information proceeding to have conclusive effect in the civil case. However, apart from other possible considerations, that order is not *res judicata* on the issues presented by this appeal because it is not a final order. The information proceedings have not been concluded either by conviction or dismissal, and, so long as the proceedings are pending, there is always the possibility that the district judge will see the error of his reasoning and vacate the erroneous order. Accordingly, even if the doctrine of *res judicata* would otherwise be applicable, the order cannot have binding effect in another action until it acquires finality. *Merriam v. Saulfield*, 241 U.S. 22, 28; *Smith v. McCool*, 16 Wall. 560, 561.

III

On the merits this case presents the question whether the fact that documents have once been produced before a grand jury subsequently found to have been defectively constituted precludes the Government from thereafter using information obtained from such documents in order to have the documents produced before a valid judicial tribunal pursuant to valid judicial process. The District Court held that the documents in effect

acquired immunity because their production, in the first instance pursuant to subpoena constituted a search and seizure, and that, when the grand jury was found to be invalid, such search and seizure became unreasonable with the result that neither the documents themselves nor the information obtained therefrom could be utilized by the Government.

A. Perhaps the simplest answer to this line of reasoning is that the invalidity in the composition of the grand jury did not render the subpoenas illegal. The grand jury had more than *de facto* existence and its proceedings had legal validity. Even indictments returned by that grand jury were at most voidable, but not void. *United States v. Gale*, 109 U.S. 65, 71; *Kaizo v. Henry*, 211 U.S. 146. Moreover, process was issued by the court, not by the grand jury, and, certainly, the defect in the composition of the grand jury did not invalidate that process.

If the production of books pursuant to subpoena does constitute a search, there was in this case a valid search. Indeed, failure to produce the books before the grand jury, notwithstanding its possible defectiveness, would have furnished the basis for valid contempt proceedings. *Blair v. United States*, 250 U.S. 273.

B. Actually, the production of the documents before the grand jury pursuant to subpoenas which, as the District Court found, were reasonable in

scope and which called for documents which the Government was entitled to have produced was not a search and seizure within the meaning of the Fourth Amendment. The District Court failed to note the distinction between an actual and a constructive search. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 203.

In the case of a true search, where premises are entered and a search made, the act of entering to search is in itself a breach of privacy and therefore from its commencement a matter within the scope of the Fourth Amendment. Whatever the nature of the articles sought, even if they be property belonging to the Government itself, the intrusion into the privacy of the home or other premises must have legal sanction. Such sanction is given when the search is authorized by a valid warrant or by those special conditions which the law has long recognized as justifying search or seizure without a warrant. The fact that the documents sought are those which the Government has a right to see is immaterial if the original intrusion of privacy is illegally made, for it is the right of privacy which the Fourth Amendment is designed to protect. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385.

No right of privacy, no castle wall is breached by an order of a court directing a person to produce specified records before a judicial tribunal. When documents are subpoenaed there is in actuality

neither a search nor a seizure. But, since the primary purpose of the Fourth Amendment is to protect the right of privacy, such cases as *Boyd v. United States*, 116 U.S. 616, and *Hale v. Henkel*, 201 U.S. 43, have said, expressly or implicitly, that where judicial process goes beyond the point of reasonableness there is, in effect, an invasion of privacy and thus a violation of the Fourth Amendment. The important point in all these decisions, however, is that this Court speaks in terms of the Fourth Amendment only to the extent to which the judicial process is unreasonable, i. e., to the extent that it seeks to obtain information which the Government has no right to secure or to the extent that the subpoena is so broad as to constitute a fishing expedition without direction. The right of privacy is not reached at all unless the subpoena goes beyond the bounds of proper Governmental action. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208.

In the present case it was judicially determined that the subpoenas for production of records before the grand jury were reasonable, that they were specific and that they called for documents which the Government had a right to have produced. Hence the issuance of the subpoenas and the production of the documents pursuant thereto did not violate the appellees' rights of privacy. The subpoenas never reached the area protected by the Fourth Amendment.

C. Even assuming that the production of documents pursuant to subpoena before a defectively constituted grand jury could be deemed a violation of the Fourth Amendment, the District Court erred in holding that the Government should for that reason be precluded from using information obtained from such documents under the rule of *Weeks v. United States*, 232 U. S. 383, and *Silverthorne Lumber Co. v. United States*, 251 U. S. 385.

The rule of suppression is based on the theory that suppression of evidence is the only effective sanction against wrongful invasion of privacy by Government officers and that, as between a defendant whose rights have been unlawfully invaded and the Government which has done the wrongful invading, the Government should not be allowed to profit by its own wrong. In this case, the prosecuting officials of the United States had no part in the only element of wrongfulness found by the District Court, the improper impanelling of the grand jury. The composition of the panel from which the grand jury was drawn was determined by the District Court or officials appointed by the District Court. While prosecuting officers of the government participated in obtaining subpoenas calling for production of documents before the grand jury, they were not charged with responsibility for the grand jury's constitution. The Government was under a duty to take the grand jury as the Court had constituted it and to produce before

that grand jury such evidence as it could obtain by issuance of subpoenas proper in themselves.

Furthermore, the appellees have already been granted redress for the alleged illegality in the manner of impanelling of a grand jury. That remedy, dismissal of the indictment, is in itself an extraordinary remedy, available to defendants without any showing that they have been prejudiced by the defective composition of the grand jury. *Ballard v. United States*, 329 U. S. 187. To add to this remedy the additional sanction of precluding the use of documents produced before the grand jury and the use of any information obtained from such documents and thus, in most instances, to grant immunity to law violators for a technical error of law which did not prejudice them would be a travesty of justice which is required neither by reason nor authority.

ARGUMENT

I

THE JUDGMENT IN THIS CASE IS A FINAL JUDGMENT WHICH WAS NOT VOLUNTARILY SOUGHT BY THE GOVERNMENT. IT IS, THEREFORE, APPEALABLE

In their motion to dismiss this appeal, appellees contended that the judgment appealed from is, in substance, a judgment on a motion for a voluntary non-suit, and therefore, not appealable.³ This

³ Appellees also asserted that this Court lacked jurisdiction on the ground that the appeal was taken from a judgment of dismissal entered on August 6, 1948, whereas, in appellees' view, the judgment dismissing the cause was entered on Sep-

Court directed that the motion to dismiss be argued at the same time as the argument on the merits (R. 382). We, therefore, discuss first the jurisdictional issues raised by the appellees.

A. The Judgment Appealed from is a Final Judgment

Although the judgment in this case directs that the complaint be dismissed without prejudice, the judgment is clearly final. *United States v. National City Lines, Inc.*, 334 U. S. 573. This Court has frequently ruled that the mere fact that a judgment of dismissal may not be a bar to a subsequent action does not detract from the finality of the judgment which concludes the particular proceeding in which it was entered. Thus, in *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 39, this Court upheld the appealability of a judgment of involuntary non-suit. In *Wilson v. Republic Iron & Steel Co.*, 257 U. S. 92, 96, it took jurisdiction of an appeal from an order dismissing an action after removal for failure to pay the costs of a previous action. In *Wecker v. National Enameling Co.*, 204 U. S. 176, 182, it upheld the appealability of a judgment of dismissal entered on plaintiff's refusal to produce evidence after denial of his motion to remand to the state court, stating that it was unnecessary to determine whether the judgment

tember 3, 1948. However, in view of the decision of this Court in *Hoiness v. United States*, 335 U. S. 297, appellees have withdrawn such ground of objection.

would or would not bar a future action, since it definitely concluded the case before the court.

B. The Judgment of Dismissal was not Voluntarily Sought by the Government

Judgments on motions for voluntary non-suits have been held to be unappealable, not on the ground that such judgments are not final, but on the principle that one who invites error may not complain of such error on appeal. *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 39; *Kelly v. Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296, 297 (C.A. 4). The sole question affecting the jurisdiction of this Court is, therefore, whether the dismissal of this action was sought by the Government so as to bring this case within that ruling.

The history of the various proceedings in the civil and criminal causes, as summarized in the Statement, *supra*, establishes that the judgment of dismissal was not the result of the Government's voluntary action. Throughout the various proceedings, the Government steadfastly and consistently sought one result, to obtain for use at the trial of this case the documents produced before the grand jury which it needed to prove the allegations of the complaint. At every step, the Government made it clear that it proposed to go ahead with the trial if it could obtain those documents, but that it would be unable to prove its case without them. The fact that, after the motion to⁹ produce testi-

mony had been denied, and the subpoenas had been quashed. Government counsel correctly anticipated that, at the trial, the Judge would adhere to the views he had previously expressed on four different occasions, and that Government counsel was thus able to assure the defense that, in the absence of the documents, there would be no trial in the usual sense of the term, does not show that the Government invited the judgment of dismissal. An appeal obviously lies when judgment is entered against a plaintiff after evidence material to its cause has been excluded. We submit that an appeal equally lies where, as here, the plaintiff has foreknowledge that the trial court's rulings will be adverse and that these rulings will exclude substantially all of the plaintiff's evidence.

This is not a case in which the plaintiff refused to present evidence which it had available in order to get a judgment which would enable it to test on review the intermediate rulings of the trial court. Even in such a situation, this Court has held that a judgment dismissing the action for failure to produce evidence after denial of a motion to remand is an appealable order. *Wecker v. National Enameling Co.*, 204 U.S. 176, 182.⁴ The instant

⁴The holding of the *Wecker* case is inconsistent with the ruling in *Rudolph v. Sensener*, 39 App. D.C. 385, on which appellants rely. The *Rudolph* case, therefore, cannot be deemed valid authority. But even if it were correct, its reasoning would be inapplicable to this case, for here the Government, in the face of the District Court's ruling, had no substantial evidence which it could have produced. The lack of evidence was not a result of the Government's own choice.

case is even stronger, for here the rulings of the District Court made it impossible for the Government to prove its case, and the Government had no choice but to submit to dismissal of its action.

There was nothing improper in the act of Government counsel in stating candidly to the court and appellees that the documentary evidence excluded by the district court's rulings was essential to the Government's case, and that the Government could not proceed unless and until these rulings were reversed on appeal. Nor in such circumstances was there anything improper in Government counsel asking the Court to enter a final judgment so that the case could be appealed, even though it was obvious that the judgment would be against the Government. The alternative of introducing such fragmentary other evidence as the Government might have, knowing that it was insufficient to make out a case, and appealing from the adverse judgment which would then be entered, would have been a futile and time-consuming gesture. We submit that the course pursued by Government counsel was the only reasonable method of protecting the public interest in a situation in which the rulings of a single district judge would, if not reversed, have the practical effect of giving immunity to alleged violators of the antitrust laws. The frankness of counsel in stating what they were trying to do is to be commended rather than criticized. The facts here are precisely like those in

Bowles v. Beatrice Creamery Co., 146 F. 2d 774 (C.A. 10), where appeals were entertained from judgments of dismissal which the trial court had entered after it had sustained motions to suppress the evidence presented by the plaintiff and after plaintiff's counsel had advised the Court that he had no additional evidence to present.

Under the facts of this case, the circumstance that, at one point the Government took the position that the dismissal of the action should be without prejudice (R. 198), does not transform this judgment into a voluntary non-suit. The last sentence of Rule 41 (b) of the Federal Rules of Civil Procedure dealing with involuntary dismissals, (*supra*, p. 4) clearly recognizes that there may be an involuntary dismissal without a motion by the defendant, and that an involuntary dismissal may nevertheless be without prejudice.

Appellees rely on *Kelly v. Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296, 297, (C.A. 4) which holds that, where a plaintiff voluntarily took a non-suit after an adverse ruling on a motion to remand, the dismissal was voluntarily invited, and therefore not appealable, although the court recognized that, if the plaintiff had failed to produce evidence and allowed a judgment of dismissal with prejudice to be entered against him, the judgment could have been appealed. That decision, however, is not controlling here. In that case, the intermediate ruling which the plaintiff

sought to have reviewed—the refusal to remand—in no way barred the plaintiff from offering such proof as it had available. A non-suit meant that, irrespective of the ultimate holding on review, or even without waiting for a ruling on review, the plaintiff could institute a new suit on the very same evidence which it could have produced at the trial which was non-suited. The court held the plaintiff to the choice of either resting on his challenge to jurisdiction, or presenting the evidence which he had.

Such is not the situation here. In this case, unless the ruling of the District Court is reversed, the Government can bring a new suit against these defendants only if it obtains evidence other than the subpoenaed documents which the trial court excluded. The Government cannot, as could the plaintiff in the *Kelly* case, start a new trial on the same evidence irrespective of the ultimate disposition of the case on review. The court apparently dismissed the action without prejudice because Government counsel stated that “conceivably” evidence might be obtained “after an investigation coextensive in time and labor with that heretofore undertaken”. What such a coextensive investigation would mean, in time and labor, is indicated by the facts set forth below.⁵ The more thorough

⁵ Investigation of the question of defendants' violations of the antitrust laws began in 1942 and ended with the return of the criminal indictment in November, 1946. In the course of the investigation four members of the staff of the Antitrust

the culling of the incriminating evidence in the grand jury proceedings which climaxed the prior investigation, the lesser the likelihood of obtaining adequate other evidence in a new investigation. Furthermore, if the district court's present rulings have as broad a scope as that ascribed to them by appellees, the new investigation would have to be by lawyers not contaminated with knowledge obtained through participation in the grand jury proceedings, in other words, by lawyers not familiar with the case.

The Government, instead of following this hard and dubious course, elected to prosecute the pending case to its end. This is the reverse of consenting to dismissal of its suit. We submit, therefore, that the "reality" amounts to prosecution, not "non-prosecution".

The purpose of a voluntary non-suit is to enable the plaintiff to institute a new suit on the same cause of action. Here what the Government sought was, not opportunity to begin a new suit, but entry of a judgment disposing of the case so that it might by appellate review obtain a ruling which would enable it to prove the case which it had alleged on the evidence which it had available at the time. The fact that, by granting a judgment of dismissal without prejudice, the district court,

Division examined the defendants' books and records from time to time during a seven-months' period, and Government lawyers participated in the grand jury investigation during a period of over six months. See affidavit of Chalmers Hamill, (R. 42-46).

believing its rulings on evidence to be correct, decided not to grant complete immunity to the appellees for their illegal acts in the event that the Government should discover other evidence, certainly does not establish that the Government consented to the dismissal of an action which it could have proved immediately if the Court had not improperly excluded the evidence then available.

- o The dismissal of the action was not invited by the Government; it was the inevitable result of the trial judge's ruling excluding substantially all of the Government's evidence. That was not error invited by the Government.

II

SINCE THE ONLY ORDER IN THE CRIMINAL PROCEEDINGS WHICH PURPORTS TO AFFECT THE RIGHT OF THE GOVERNMENT TO USE THE SUBPOENAED DOCUMENTS IN THE CIVIL SUIT IS NOT A FINAL ORDER, THERE IS NO ISSUE OF RES JUDICATA.

Appellees make one other contention designed to prevent consideration by this Court of the merits of the district court's ruling refusing discovery of the documents subpoenaed before the grand jury, and quashing the subpoenas in the civil action for the production of such documents. They argue that the appeal in this case seeks merely to review orders in the criminal proceedings from which the Government could have, but did not appeal, and that, irrespective of their merits, such orders are *res judicata* on the issues presented by this appeal.

The appeal, however, brings up for review orders made in the civil case pertaining to evidence pertinent to that case, and is not, therefore, an appeal from orders in the criminal proceedings. As to the question of *res judicata*, it is the Government's position that only the order of preclusion has any possible bearing on the issues in the civil suit, and that even if the doctrine of *res judicata* were otherwise applicable, such order cannot be *res judicata* here because it is not final.

A. The Orders Entered in the Indictment Proceeding Did Not Preclude the Government from Using the Subpoenaed Documents in the Civil Suit

1. Appellees contend that the Government is precluded from challenging the validity of the trial judge's rulings excluding evidence in the civil suit because it did not appeal from the order dismissing the indictment. However, it is not necessary for the Government to take the position that the dismissal of the indictment was erroneous. It is the Government's position that, even though the indictment was properly dismissed because of a defect in the composition of the grand jury, the documents produced before that grand jury did not become immune from further inspection and from further production pursuant to valid judicial process before a valid judicial tribunal. The order releasing the documents from the impounding

order was ancillary to the order dismissing the indictment. Since it merely directed the return of the original documents to the appellees, there was no reason for the Government to appeal from such order.

2. The motion for the surrender of the photostats was brought in the form of a separate proceeding after the information had been filed, but the District Court directed that the order granting such motion and the motion papers be filed in the indictment proceeding since, under his reasoning, the order for surrender of the photostats was a necessary consequence of the dismissal of the indictments.

Whether or not such order could be deemed a final order in an independent proceeding and therefore appealable, there was no reason for the Government to appeal from that order. It merely directed the return of the photostats and did not in terms preclude the use of such documents in evidence in some other proceeding. As this Court recognized in *Zap v. United States*, 328 U. S. 624, 629, an order for return of evidence is not necessarily an order of preclusion. See *In re Sana Laboratories, Inc.*, 115 F. 2d 717, 718 (C.A. 3) certiorari denied 312 U. S. 688, where the court, holding that there had been an improper seizure after a valid inspection, ordered the return of the seized documents but refused to order the suppression of the information obtained as a result of the inspection.

True, the opinion of the court on the motion for return of the photostats was based on reasoning which, if valid, would have supported an order of preclusion. The order itself, however, did not go that far. Had the Government sought to take an appeal, it would undoubtedly have been met with the argument that the order did not prevent the Government from obtaining the documents by valid process. The question in which the Government was interested, its right subsequently to use those documents, was academic in relation to the particular order entered in the indictment proceedings. Certainly the Government was under no duty to endeavor to take an appeal of doubtful propriety from an order which did not prejudice it merely because the District Court, in its opinion, used language which gave forewarning that it would rule adversely to the Government when the issue was directly involved.

B. The Order of Preclusion in the Information Proceeding is not a Final Order and, Therefore, Not Res Judicata on the Issues Presented by this Appeal

The only order in the criminal proceedings which by its terms has any bearing on the Government's right to obtain the documents as evidence in the civil suit is the order of April 20, 1948 (R. 95-96), entered in the information proceeding, to the effect that the court's opinion of February 6,

1948 (R. 81-85), was controlling as to that portion of appellees' motion which sought to preclude the use for any purpose of knowledge obtained from the documents produced before the grand jury pursuant to subpoena.

However, it is clear from the statements made by the District Judge that he did not intend that order to have any conclusive effect in the civil case (R. 117, 119, 120), and indeed declared (R. 126): "I don't see how this is going to prejudice you in some other case, and this Court is concerned only with 6070 at this time, as I understand it." Moreover, it is highly doubtful whether Rule 41(e) of the Federal Rules of Criminal Procedure may properly be construed so as to authorize an order that would have binding effect in a subsequent civil suit of this character; for the notes of the Advisory Committee point out that Rule 41(e) was not intended to go beyond existing law on this issue, and no such result was generally accepted prior to the adoption of Rule 41(e).

Were the order of April 20, 1948, a final order, there would thus be presented the question as to whether the order was ever intended to be conclusive in this civil case, and there would also be raised the interesting problem of the extent to which an order in a criminal proceeding, from which the Government has no right to appeal, can, even if clearly erroneous, forever bar the Government from using such evidence in another action.

particularly in a civil case such as the one at bar. But these issues need not be reached here, for the order of preclusion is clearly not a final order. It is an order on a motion made specifically with relation to the information theretofore filed as part of a motion to dismiss or expunge portions of that information. It is an order on a motion made by the parties named as defendants in the information. It is, therefore, an order made in the information proceeding which has not yet been terminated by conviction or dismissal. Had the order been adverse to appellees, they would have had no right of appeal therefrom. — *Cogen v. U. S.*, 278 U. S. 221, 227. And even though the order granting the motion is in practical effect more final as to the Government than an order denying the motion would be as to appellees, it is, nevertheless, an intermediate order from which the Government has no right of appeal, irrespective of the question of the Government's right of appeal in a criminal case. *United States v. Rosenwasser*, 145 F. (2d) 1015, (C.A. 9).

Since, therefore, the order of preclusion is not a final order, it cannot operate as *res judicata*. It is well established that only final orders may be relied upon as *res judicata*. *Merriam v. Saatfield*, 241 U. S. 22, 28; *Smith v. McCool*, 16 Wall 560, 561; *Reed v. Proprietors of Locks and Canals*, 8 How. 274, 291. See also *United States v. Davis*, 3 F. Supp. 97, 98 (S.D.N.Y.), in which the court held that

an order denying a motion to suppress, entered in a criminal proceeding which had resulted in a mistrial, was not *res judicata* on a subsequent motion to suppress, since the earlier order lacked finality. The fact that Rule 41(e) of the Federal Rules of Criminal Procedure may authorize an order having scope beyond the particular proceeding in which it is entered "does not confer finality upon an order entered in a proceeding which has not yet been terminated. So long as the proceeding is pending, there is always the possibility that the district judge will see the error of his reasoning and vacate the erroneous order. See *Cogen v. United States*, 278 U. S. 221, 224, where this Court recognized that an order denying a motion to preclude was subject to change. The order cannot have binding effect in another action until it acquires finality.

III

THE PRODUCTION OF DOCUMENTS BEFORE A DEFECTIVELY IMPANELED GRAND JURY PURSUANT TO SUBPOENAS WHICH WERE REASONABLE IN SCOPE WAS NOT AN INVASION OF APPELLEES' RIGHTS UNDER THE FOURTH AMENDMENT, AND THE EVIDENCE SO PRODUCED SHOULD NOT HAVE BEEN SUPPRESSED

On the merits, this case presents the question whether the fact that documents have once been

*As pointed out above, however, it is at least arguable whether Rule 41(e) goes so far as to authorize such an order that would have binding effect in a subsequent civil proceeding of this character. Certainly, it is clear from statements made by the District Judge (R: 117, 119, 120, 126) that he did not intend his order of preclusion, entered in the information proceedings, to have conclusive effect in the civil case.

produced before a grand jury, subsequently found to have been defectively constituted precludes the Government from thereafter using information obtained from such documents in order to have the documents produced before a valid judicial tribunal pursuant to valid judicial process. The District Court held that the documents in effect acquired immunity because their production in the first instance pursuant to subpoena constituted a search and seizure, and that, when the grand jury was found to be invalid, such search and seizure became unreasonable with the result that neither the documents themselves nor the information obtained therefrom could be utilized by the Government.

A. The Defect in the Composition of the Grand Jury Did Not Render the Grand Jury a Wholly Illegal Body and Therefore Did Not Render the Subpoenas Illegal.

Perhaps the simplest answer to the reasoning by which the District Court reached the conclusion that the evidence produced before the Grand Jury pursuant to subpoena had to be suppressed is that the invalidity in the composition of the grand jury did not render the subpoenas illegal. The grand jury had more than *de facto* existence, and its proceedings had legal validity. Even indictments returned by that grand jury were at most voidable, but not void. If a defendant indicted by that grand

jury failed to move to dismiss the indictment before trial he could not, after conviction, successfully move in arrest of judgment on the ground that he had not been prosecuted by indictment as required by the Constitution. *United States v. Gale*, 109 U. S. 65, 71. He could not, after sentence, have secured his release on habeas corpus on the ground that the indictment would not support the jurisdiction of the court which tried him. *Kaizo v. Henry*, 211 U. S. 146; *Redmon v. Squier*, 162 F. (2d) 195, 196 (C.A. 9); *Kelly v. Squier*, 166 F. (2d) 731 (C.A. 9), certiorari denied 334 U. S. 849; See also *King v. United States*, 165 F. (2d) 408 (C.A. 8), certiorari denied, 334 U. S. 848. As this Court said in *United States v. Gale*, *supra*, at p. 71:

There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury may be taken at any time. These are where the whole proceeding of forming the panel is void; as where the jury is not a jury of the court or term in which the indictment is found, or has been selected by persons having no authority whatever to select them; or where they have not been sworn; or where some other fundamental requisite has not been complied with. But there is no complaint of this kind in the present case; the complaint simply relates to the action of the court in excluding particular persons who might properly have served on the jury. We do not think that this vitiated all the proceedings so as to render them absolutely null

and void. It might have sufficed to quash the indictment if the objection had been timely and properly made. Nothing more.

Since, therefore, the defect in the composition of the grand jury does not render an indictment returned by that grand jury void, such defect cannot invalidate process, issued not by the grand jury, but by the court. The grand jury obviously had sufficient legal validity to have authority to examine documents. Hence, the court could properly order documents produced before the grand jury, and the Government prosecuting officers could properly examine those documents. A witness called before the grand jury has no standing to challenge its composition so long as the grand jury has *de facto* existence, *Blair v. United States*, 250 U.S. 273, 282. Contempt in refusing to appear pursuant to a subpoena for production of records before a *de facto* grand jury would not be excused because of any such defect as that here involved (see *Blair v. United States, supra*), any more than willful failure to appear pursuant to subpoena to testify on the trial of an action would be excused on the ground that the court lacked jurisdiction of the cause. See *Fairfield v. United States*, 146 Fed. 508 (C.A. 8) holding that the failure of a complaint to state a cause of action did not constitute a defense to willful disobedience of a subpoena. The *Blair* case implicitly recognizes that a defect in the composition of the grand jury

which does not destroy its legal validity does not invalidate process for appearance before that body, for if it did, the invalidity of the process would be a defense to non-appearance.

The subpoenas by which the documents involved in this case were produced before the grand jury were, therefore, valid legal process, and the production of documents pursuant thereto, if it was a search, was a valid search. Indeed, under the rule of the *Blair* case, the very documents here involved were properly before the grand jury, and a refusal to produce them in accordance with the subpoenas would have been the basis for valid contempt proceedings. The compulsory production of these documents before the grand jury in no sense constituted an illegal search. The District Court therefore erred in denying the Government's motion for discovery and in quashing the subpoenas in the civil suit on the ground that the "search" pursuant to subpoena was an illegal search.

B. The Production of Documents Which the Government Had a Right to See Pursuant to Subpoena Reasonable in Scope Was Not a Search Within the Meaning of the Fourth Amendment

Actually, the production of the documents before the grand jury pursuant to subpoenas which, as the District Court found, were reasonable in scope and which called for documents which the Government was entitled to have produced, was not a

search and seizure within the meaning of the Fourth Amendment. The District Court is mistaken in its basic premise that the mere production of documents pursuant to subpoena is in itself a search and seizure. The District Court has misread such decisions of this Court as *Boyd v. United States*, 116 U.S. 616; *Hale v. Henkel*, 201 U.S. 43, 76-77; *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 305-306, and has failed to recognize the distinction between an actual and constructive search. The decision below is another example of the situation which this Court found in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 202, when it said that "the primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure."

In the case of a true search, where premises are entered and a search made, the act of entering to search is in itself a breach of privacy and therefore from its commencement a matter within the scope of the Fourth Amendment. Whatever the nature of the articles sought, even if they be property belonging to the Government itself, the intrusion into the privacy of the home or other premises must have legal sanction. Such sanction is given when the search is authorized by a valid warrant or by those special conditions which the law

recognizes as justifying search or seizure without a warrant. The fact that the documents sought are those which the Government has a right to seize is immaterial if the original intrusion of privacy is illegally made, for it is the right of privacy which the Fourth Amendment is designed to protect. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392.

No right of privacy, no castle wall, is breached by an order of a court directing a person to produce specified records before a judicial tribunal. When documents are subpoenaed, there is in actuality neither a search nor a seizure. But, since the primary purpose of the Fourth Amendment is to protect the right of privacy, the cases referred to above have said, expressly or implicitly, that where process goes beyond the point of reasonableness, there is, in effect, an invasion of privacy, and thus a violation of the Fourth Amendment. The important point in all these decisions, however, is that this Court has spoken in terms of the Fourth Amendment only to the extent to which the process is unreasonable, i.e. to the extent that it seeks to obtain information which the Government has no right to secure, or to the extent that the subpoena is so broad as to constitute a fishing expedition without direction. The right of privacy is not reached at all unless the subpoena goes beyond the bounds of proper governmental action.

The fountainhead of the doctrine of constructive search is the case of *Boyd v. United States*, 116 U.S. 616, and that very case makes clear one of the limitations of the doctrine. The *Boyd* case was concerned with a Statute which declared that in an action for forfeiture (interpreted by the Court as a criminal case), the United States could demand the production of records which would tend to support the allegations of the complaint, and that, if a defendant should refuse to produce such records, the allegations made by the Government should be taken as confessed. The Court held that to make non-production of records a confession of facts was the equivalent of compelling the production of testimony, and therefore a violation of the privilege against self-incrimination guaranteed by the Fifth Amendment. It also held (p. 622) that:

... a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.

Throughout the opinion, however, the emphasis is on the fact that the evidence sought to be compelled consisted of "private papers", i.e. papers which the Government had no right to procure

under any other available form of judicial process. It was the nature of the papers sought, and not the mere fact of compulsory production, which brought the compulsory production of such papers within the scope of the Fourth Amendment.

That consideration is made even clearer by the subsequent case of *Wheeler v. United States*, 226 U.S. 478, 489-490, where this Court upheld the validity of a subpoena for the production of the books of a defunct corporation which were held by one of the former stockholders. In that case, this Court emphasized that the subpoenaed papers were not private documents and held that it was the character of the documents, and not the nature of the custody in which they were held, that determined the propriety of their compulsory production in the light of the Fourth Amendment. The case points up the distinction between a true and a constructive search, for, if the mere fact of compulsory production of papers were in itself a search, then the individual rights of the individual holding such papers would have been the major consideration. Certainly, an entry into the home of the stockholder to get the corporate papers from his possession without a warrant would have been a violation of the Fourth Amendment even though the papers themselves were not privileged. In the case of a constructive search, therefore, it is not the fact of production, but the nature of the

documents to be produced, which determines the applicability of the Fourth Amendment.

The other line of cases dealing with the Fourth Amendment in relation to judicial process has held that process violates the Amendment when its demands are so sweeping that they can be characterized as a fishing expedition, embarked upon without direction, on the mere possibility that examination may uncover evidence of crime. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-306; *Hale v. Henkel*, 201 U. S. 43, 76-77. Here, again, the violation of the Fourth Amendment has not been found to lie in the mere fact that books and papers must be produced. A search occurs only if the demands of the process go beyond the point of reasonableness. It necessarily follows that where a subpoena is reasonable, i.e., where it is specific and calls for the production of documents which the Government has a right to see, the Fourth Amendment never comes into play. As this Court said in *Wilson v. United States*, 221 U. S. 361, 376:

there is no unreasonable search and seizure, when a writ, suitably specific and properly limited in its scope, calls for the production of documents which, as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced. * * *

It would probably be more accurate to say that in such situations there is no search and seizure at all. See *United States v. Bausch & Lomb*, 321 U. S. 707, 727.

This Court summed up the whole problem of the relation of the Fourth Amendment to the compulsory production of corporate records in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 208, as follows:

the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

Production of documents pursuant to reasonable subpoenas issued on behalf of the defectively constituted grand jury did not, therefore, invade appellees' rights under the Fourth Amendment. The significant facts with respect to the relation of subpoenas to the Fourth Amendment are only whether the documents were the kind of records whose production could be compelled and whether the process compelling that production was sufficiently definite. In the present case, it was judicially determined that the subpoenas for the production of records before the grand jury were reasonable, that they

were specific, and that they called for documents which the Government had a right to have produced. Hence, the issuance of the subpoenas and the production of the documents pursuant thereto did not violate the appellees' rights of privacy. The subpoenas never reached the area protected by the Fourth Amendment.

C. The Reasons Underlying the Rule Requiring the Suppression of Evidence Have No Application to the Circumstances of This Case

Even assuming that the production of documents pursuant to subpoena before a defectively constituted grand jury could be deemed a violation of the Fourth Amendment, the District Court erred in holding that the government should, for that reason, be precluded from using information obtained from such documents. This is not a case which would justify the application of the rule of *Weeks v. United States*, 232 U. S. 383, and *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, requiring the suppression for all purposes of evidence seized by Government officers in violation of the Fourth Amendment. As those cases make clear, the rule of suppression is based on the theory that suppression of evidence is the only effective sanction against wrongful invasion of privacy by Government officers, and that, as between a defendant whose rights have been unlawfully invaded and the Government which has done the wrongful invading,

the Government should not be allowed to profit by its own wrong. The doctrine is an exception to the usual common law rule holding that relevant evidence will not be excluded. *Olmstead v. United States*, 277 U. S. 438, 467-468. It has not been extended beyond the point of requiring the wrongdoer to pay for his own wrong. Thus in *Burdeau v. McDowell*, 256 U.S. 465, this Court held that the Government was not required to return evidence received from a private party who had obtained the documents by theft or trespass since the Government had no part in the illegal action. Cf. *Feldman v. United States*, 322 U. S. 487, 492.

Neither of the basic reasons underlying the *Weeks* rule exists in this case. Prosecuting officers of the United States had no part in the only element of wrongfulness found by the District Court, the improper impanelling of the grand jury. The composition of the panel from which the grand jury was drawn was determined by the District Court or officials appointed by the District Court. While the prosecuting officers participated in obtaining subpoenas calling for production of documents before the grand jury, they were not charged with responsibility for the grand jury's improper constitution. It had been summoned by the court and had at least *de facto* existence. In these circumstances, Government prosecuting officers cannot be held to the duty of deciding for themselves that the grand jury has been improperly constituted and

has no power to investigate crime in that district. Cf. *Blair v. United States*, 250 U. S. 273, 282, where this Court held that a witness summoned to appear before a grand jury could not challenge the validity of its existence. The Government was under a duty to take the grand jury as the court had constituted it, and to produce before that grand jury such evidence as it could obtain by issuance of subpoenas proper in themselves.

Furthermore, the appellees have already been granted redress for the one element of wrongfulness which the District Court found, the technical defect in the manner of impanelling the grand jury. That remedy, dismissal of the indictment, is in itself an extraordinary remedy, not based upon constitutional grounds, but granted by this Court as a means of exercising its supervisory power over the administration of justice in the lower federal courts, without the necessity of a showing by defendants that they are members of the excluded class or that they have been prejudiced by the defective composition of the grand jury. *Ballard v. United States*, 329 U.S. 187, 192-193. The extraordinary nature of this remedy is particularly apparent when it is considered in relation to the facts of this case. Appellees—large corporations and male officers thereof—were able to obtain the dismissal of an indictment which charged a violation of federal statutes relating to restraints on interstate commerce, a charge based almost ex-

clusively on documentary evidence obtained from appellees themselves pursuant to valid subpoenas. Appellees were not members of the excluded class and could show no prejudice from the exclusion of women. No constitutional rights were involved, the eligibility of women being a matter of state law which was made applicable by federal statute, and not of constitutional right. The exclusion of women was not the result of a deliberate disregard of the state law by the federal district court, but was the result of an ambiguity in the condition imposed by the state statute in requiring a prior finding by a jury commissioner that the accommodations for women were adequate. There was in this case no finding by any jury commissioner on the adequacy of the facilities for women in the federal courthouse and, in ruling on this case, the judge himself expressed doubts as to the adequacy of the available facilities (R. 69). The district judge was not certain of the correctness of his ultimate ruling dismissing the indictment (R. 69). The Government did not appeal that ruling, and we are not here questioning its validity. We do point out, however, that, under all these circumstances, the remedy of dismissal of the indictment was more than adequate to compensate appellees for any possible wrong to them resulting from the failure to include women in the panel of grand jurors, and that appellees have obtained a very

substantial remedy for a very technical defect in the composition of the grand jury.

For this technical defect resulting from, at most, the misconstruction of a state statute by a federal district court, in impanelling the grand jury, appellees will, if the instant judgment of the district court be upheld, obtain, in addition to the extraordinary remedy they have already been granted, the far greater remedies which this Court has hitherto granted only to defendants whose constitutional rights of privacy have been wrongfully invaded. For a technical defect in the composition of the grand jury which did not prejudice appellees, and which was not attributable in any way to fault on the part of Government officers, all documents produced before the grand jury and all information obtained from such documents have been declared immune from further use by the Government, not only in a criminal proceeding, but in a civil suit as well. A technical defect in the composition of the grand jury, resulting from a permissible construction of an ambiguous state statute by a federal district court, thus becomes a means of granting immunity to law violators, not only from criminal responsibility but also from their liability to the Government under civil law. Such a result, we submit, is a travesty of justice, which is required neither by reason nor authority.

CONCLUSION

We respectfully submit that this Court has jurisdiction of this appeal, and that the judgment below should be reversed with directions to the District Court to grant the Government's motion for discovery under Rule 34 and to permit the Government to issue subpoenas for the production of the documents produced before the grand jury.

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